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Nos. 89-1838 and 89-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALI BOURESLAN and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

ARABIAN AMERICAN OIL COMPANY and ARAMCO SERVICES COMPANY,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS ARABIAN AMERICAN OIL COMPANY AND ARAMCO SERVICES COMPANY

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QUESTION PRESENTED

Did Congress intend to extend the provisions of Title VII of the Civil Rights Act of 1964 to a U.S.-incorporated employer that employs citizens of the United States exclusively in a foreign country?

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BRIEF IN OPPOSITION FOR RESPONDENTS ARABIAN AMERICAN OIL COMPANY AND ARAMCO SERVICES COMPANY

Respondents Arabian American Oil Company ("Aramco") and Aramco Services Company ("ASC") respectfully request that this Court deny the petitions for a writ of certiorari filed by the Equal Employment Opportunity Commission ("EEOC") and Ali Salim Boureslan ("Boureslan") that seek review of the *en banc* decision of the United States Court of Appeals for the Fifth Circuit.[1]

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[1] The information required by Rule 29.1 of the Rules of this Court is included in Appendix A.

OPINIONS BELOW

The *en banc* decision of the court of appeals is reported at 892 F.2d 1271 (1990) (Pet. App. 1a-27a).[2] The panel decision is reported at 857 F.2d 1014 (1988) (Pet. App. 28a-76a). The district court decision that was affirmed by both the panel and the *en banc* court is reported at 653 F. Supp. 629 (1987) (Pet. App. 77a-82a).

STATUTORY PROVISIONS INVOLVED

The most relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, and of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, are set out in Appendix B, 2a-6a.

STATEMENT OF THE CASE

Aramco was at all relevant times a Delaware corporation whose principal place of business and records were located in Dhahran, Saudi Arabia. Since its inception and until recently, Aramco's business had been the exploration for, production, refining and sale of oil and gas exclusively in Saudi Arabia.[3] ASC, formerly (and at the times relevant to this litigation) a subsidiary of Aramco, is a Delaware corporation headquartered in Houston, Texas.

Petitioner Boureslan is a naturalized American citizen whose national origin is Lebanese, whose race is Arab, and whose religion is Moslem. Boureslan was employed as a cost engineer by ASC in Houston from

[2] "Pet. App." refers to the Appendix to the Petition for Certiorari filed by the Solicitor General on behalf of the EEOC.

[3] Aramco employed a multinational workforce, including Saudi Arab and U.S. citizens as well as citizens of any other countries. As a result of the creation in 1988 of the national oil company of Saudi Arabia, the Saudi Arabian Oil Company (Saudi Aramco), the assets, business and employees of Aramco recently were transferred to Saudi Aramco.

July 1979 to November 1980, when at his request he was transferred to Saudi Arabia to work for Aramco. He remained at Aramco until his employment was terminated as part of a general reduction in force in June 1984.

Boureslan alleged discrimination by his immediate supervisor (a citizen of the United Kingdom) on the basis of national origin, race and religion during part of the period he was employed by Aramco in Saudi Arabia in charges filed against Aramco with the EEOC. He later brought suit against Aramco and ASC in the United States District Court for the Southern District of Texas, alleging violations of Title VII and state law.

Aramco and ASC each moved to dismiss Boureslan's complaint for lack of subject matter jurisdiction.[4] The district court granted the motions, finding that the language and legislative history of Title VII lacked any clearly expressed statement of intent by Congress to apply Title VII extraterritorially. Pet. App. 79a. The district court applied the presumption, articulated by this Court in *Foley Bros.* v. *Filardo*, 336 U.S. 281 (1949), that statutes are generally presumed not to have extraterritorial application, and concluded:

> It is doubtful that Congress reserved the question of Title VII's application for the courts to decide. It is much more likely that Congress never considered the issue.

Pet. App. 81a. The district court also dismissed Boureslan's state law claims.

[4] Respondent ASC also moved to dismiss the complaint on two additional grounds: (i) that Boureslan did not work for ASC at the time of the alleged discrimination, and (ii) that, by failing to assert claims against ASC in his EEOC charges, Boureslan failed to exhaust his administrative remedies against ASC. Pet. App. 30a-31a. ASC maintains, contrary to Petitioner Boureslan's assertion (Boureslan Pet. 4), that the ASC motion was granted on these grounds as well.

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision. Following this Court's reasoning in *Foley*, the majority held that a statute should not be applied extraterritorially absent a clear expression of intent by Congress. The panel found that "[e]xtraterritorial application is not directly addressed in Title VII" itself (Pet. App. 34a), and that the EEOC had pointed to only three general statements in the extensive legislative history that the EEOC believed supported its argument that the statute applies outside the United States. *Id.* at 37a-38a. The court concluded that these references:

> fall far short of the clear expression of congressional intent required to overcome the presumption against extraterritorial application. . . . To rely on such general policy statements would effectively adopt a presumption in favor of extraterritorial application.

Id. at 38a. Congress simply "did not turn its attention" to the possibility of the extraterritorial application of Title VII, and "[i]t is not for this court to decide this policy issue for the legislative branch." Pet. App. 41a.

The dissenting opinion conceded that "[t]erritoriality is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction." Pet. App. 44a n.2, quoting *Restatement (Third) of Foreign Relations Law of the United States* § 402 comment b (1986). The dissent also acknowledged the presumption that Congress intends legislation to apply only within the territorial jurisdiction of the United States absent a contrary intent. *Id.* at 43a-44a. Expressly eschewing reliance only on "the broad jurisdictional language" of Title VII (Pet. App. 45a) now relied on by the EEOC (EEOC Pet. 8-9), the dissent nevertheless purported to find the requisite clear congressional intent necessary to overcome the presumption by negative inference from the statute's exemption of employers "with respect to the employment of

aliens outside any State" (42 U.S.C. § 2000e-1, the "alien exemption provision"). Pet. App. 46a-47a, 74a.

Adopting an analytical framework concededly never applied by any court (Pet. App. 51a-52a & n.10), the dissent analyzed the "reasonableness" of applying Title VII extraterritorially "[*b*]*efore* examining the language and legislative history" of the Act. *Id.* at 51a-52a (emphasis added). The dissent concluded that because extraterritorial application would "in general be reasonable" (Pet. App. 67a), "we do not need to search for an *affirmative* expression of congressional intent to apply Title VII extraterritorially." *Id.* at 68a-69a (emphasis in original).[5]

On rehearing *en banc*, the court by a vote of 9-5 again affirmed the district court's dismissal of Boureslan's complaint. Pet. App. 1a-2a, 7a. The *en banc* majority stated that respect for "the right of nations to regulate conduct within their own borders" underlies the established presumption that statutes do not have extraterritorial application unless there is a "clear congressional intent" to so apply them. Pet. App. 2a-3a. It concluded that neither the provisions of Title VII nor the legislative history relied upon by Boureslan and the EEOC indicated such a "clear congressional intent" to apply the Act to employers outside the borders of the United States.

The *en banc* court rejected the argument that a negative inference from the alien exemption provision was a clear expression of congressional intent to apply Title VII extraterritorially. Pet. App. 4a. It found, as had the panel, that both the statutory provisions and the leg-

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[5] The approach of the dissenting opinion is directly contrary to that taken by the Restatement of Foreign Relations Law, under which one looks first to whether Congress has purported to "prescribe" law outside its own territory and only then to whether its action was reasonable. *See Restatement (Third) of Foreign Relations Law of the United States* §§ 402, 403 and comments.

islative history of Title VII demonstrate a strong "domestic focus." It noted that the language and legislative history of Title VII make repeated references to "United States," "states," and "state proceedings," with no parallel references to foreign countries or procedures. *Id.* at 5a, 39a-40a.

The court also noted that Title VII is "curiously silent" in areas where Congress would be expected to clarify the operation of a statute that applies extraterritorially: Congress did not give the EEOC authority to investigate violations outside the United States; it did not address accommodation of conflicts with foreign discrimination laws, even though it addressed accommodations for state discrimination laws in detail; and it included no venue provision for actions involving foreign violations. Pet. App. 5a. Furthermore, if Title VII applied extraterritorially, the plain language of the Act necessarily would extend to foreign employers and impose Title VII "on a foreign employer who had the grace to employ an American citizen in its own country"—a result the court was reluctant to attribute to Congress. *Id.* at 6a.

Finally, the court noted that Congress knows how to give extraterritorial effect to one of its statutes when it desires to do so, citing *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 691 (1989). Pet. App. 6a. As illustrated by the language of a number of statutes that do apply extraterritorially, Congress is aware of "the need to make a clear statement of extraterritorial application, address the concerns of conflicting foreign law, and provide the usual nuts-and-bolts provisions for enforcing those rights." *Id.* The court declined to conclude that Congress had "balanced Title VII's important goals against the foreign sovereignty concerns that underlie the presumption against extraterritoriality, considered the implications of application abroad and then addressed these concerns by inviting courts to read between the lines." Pet. App. 7a.

REASONS FOR DENYING THE PETITION

1. The petition should be denied because there is no conflict among the circuits on the question whether Congress intended Title VII to apply extraterritorially. Furthermore, the absence of any conflict among the circuits is not overcome either by the existence of a handful of poorly reasoned district court decisions or by the EEOC's own interpretation of Title VII. The supposedly consistent interpretation of Title VII by the EEOC in fact has varied from 1964 to 1988, and the EEOC's first attempt to articulate guidance on how its assumed extraterritorial jurisdiction would work was a policy statement that dates only from September 1988.

2. This Court has consistently held that legislation of Congress is presumed to apply only within the territory of the United States, and that the presumption against extraterritorial application of a statute can be overcome only by a clear and affirmative expression of contrary intent. The Fifth Circuit properly concluded that such a clear expression of congressional intent is not present in the language and legislative history of Title VII.

The requisite clear expression of affirmative congressional intent cannot be found in Title VII's definition of "commerce." The statutes on which Title VII's definitional provisions were based—the Labor Management Relations Act of 1947 and the National Labor Relations Act—have been held by this Court not to have extraterritorial application. *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142, 147 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963).

Nor can the requisite clear expression of intent be found in the negative inference from the alien exemption provision of Title VII. Such a negative inference is not a reliable or proper source of congressional intent to

rebut the presumption against extraterritorial application of a statute. *See Sandberg* v. *McDonald*, 248 U.S. 185, 195 (1918). Congress knows how to provide expressly for extraterritorial application when it wants a statute to apply beyond the borders of the United States. *See Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 691 (1989).

3. Only Congress should decide whether U.S. laws should apply to workplaces overseas where U.S. citizens are employed. It alone has the facilities necessary to make such important policy decisions where "the possibilities of international discord are so evident and retaliative action so certain." *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. at 147. Congress has not expressed its intent that Title VII apply extraterritorially, and the Fifth Circuit properly declined to make the choices that are assigned to Congress.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE QUESTION WHETHER CONGRESS INTENDED TITLE VII TO APPLY EXTRATERRITORIALLY

The Fifth Circuit is the first and only court of appeals to have decided the question of the extraterritorial application of Title VII. Although the EEOC cites a number of district court decisions for the proposition that Title VII applies to employers abroad, the district courts that have considered the question all rely on *Bryant* v. *International Schools Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982), which based its reasoning on *dicta* in a footnote in *Love* v. *Pullman Co.*, 13 Fair Emp. Prac. Cas. (BNA) 423, 426 n.4 (D. Colo. 1976), *aff'd on other grounds*, 569 F.2d 1074 (10th Cir. 1978). Not only was *Bryant* reversed on appeal, but the Third Circuit ex-

pressly declined to reach the question of Title VII's extraterritorial application: "No court has decided the extraterritorial applicability of Title VII and we find it unnecessary to do so to decide this case." *Bryant* v. *International Schools Servs., Inc.*, 675 F.2d at 577 n.23.[8]

Furthermore, these district court decisions all relied exclusively on a negative inference from the alien exemption provision as the sole basis for applying Title VII to employers of U.S. citizens outside the United States. By arguing in this Court both that the definitional sections of Title VII, rather than the alien exemption provision, are the primary source of extraterritorial jurisdiction (EEOC Pet. 8-9), and (in a slightly different context) that "Congress could not have intended to employ an *exemption* to extend Title VII's coverage . . ." (*id.* at 10 n.6 (emphasis in original)), the EEOC significantly undercuts the reasoning and the already limited precedential value of the very decisions it cites.

In the absence of any conflicting court of appeals decision, the EEOC attempts to enhance the limited significance of the district court decisions it cites by reference to its own interpretation of Title VII in favor of extraterritorial application, going back "at least 15 years." EEOC

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[8] The third case cited by the EEOC is *Seville* v. *Martin Marietta Corp.*, 638 F. Supp. 590 (D. Md. 1986). While *Seville* and the recent district court decision in *Akgun* v. *Boeing Co.*, No. C89-1319D (W.D. Wash. June 7, 1990), adopt *Bryant*'s negative inference rationale, the district court in *Lavrov* v. *NCR Corp.*, 600 F. Supp. 923 (S.D. Ohio 1984), viewed the *Bryant* decision critically and held that Title VII would *not* apply to a foreign corporation employing a U.S. citizen abroad, a view that is contrary to the effect of the EEOC's argument in this case. Furthermore, the circuit in which *Bryant* was decided itself expressed doubt about the propriety of the *Bryant* decision in *Cleary* v. *United States Lines, Inc.*, 728 F.2d 607, 609 (3d Cir. 1984). Thus, existing authorities reflect a variety of views rather than the sharp split of authority suggested by the EEOC. *See* EEOC Pet. 14.

Pet. 14.[7] During the 26 years since the passage of Title VII, however, the EEOC's own views on extraterritorial application have been far from consistent. From 1964 until 1970, it was silent on the issue. In 1970, it issued a regulation stating:

> Title VII of the Civil Rights Act of 1964 protects all individuals, both citizen and noncitizens, *domiciled or residing in the United States*, against discrimination on the basis of race, color, religion, sex, or national origin.

29 C.F.R. § 1606.1(c) (1970) (emphasis added). This regulation was amended to delete the "domiciled or residing" language in 1980, sixteen years after Congress enacted Title VII, "to conform with coverage of Title VII." 45 Fed. Reg. 85,633 (1980). Nothing was substituted for the deleted language, and today the regulation remains silent on the geographic reach of the statute.

In 1985, the EEOC stated in a published decision that Title VII "contains no [statutory] provision specifically

[7] The EEOC also cites then-Assistant Attorney General Scalia's 1975 testimony on the Arab boycott legislation. EEOC Pet. 15. Relying on the negative inference from the alien exemption provision, Assistant Attorney General Scalia testified that the alien exemption provision "implies" that Title VII "is applicable to the employment of United States citizens by covered employers anywhere in the world." *Foreign Investment and Arab Boycott Legislation: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 1st Sess. 165 (1975). The purpose of the testimony, however, was primarily to persuade Congress that Arab boycott legislation was not needed. It is doubtful that the testimony, which by its implication would extend coverage to foreign employers, is a definitive statement of the Justice Department's then-position on the geographic reach of Title VII, especially since the civil enforcement authority for Title VII by then lay with the EEOC, whose regulation at that time suggested a conclusion different from the implication of the testimony. *See infra* pp. 10-11.

addressing its territorial reach" and that "the legislative history of the Act is similarly silent on this issue." Decision No. 85-16, Emp. Prac. Guide (CCH) § 6857 (1985). The agency nevertheless concluded by negative inference from the alien exemption provision that Title VII "does apply to covered employers with respect to their employment of U.S. citizens outside the United States." *Id.* It was not until September 1988, however, immediately before the panel decision in this case was rendered, that the EEOC issued a general policy statement that Title VII applied to employers of U.S. citizens in foreign countries. Policy Statement No. 88-15, EEOC Compl. Man. (CCH) § 2187 (1989).

Thus, in 1975 when the General Counsel of the EEOC wrote to the Senate Foreign Relations Committee in support of the extraterritorial application of Title VII (EEOC Pet. 14), his statement was contrary to the EEOC's own regulation that was then in force. In fact, for 24 years the EEOC never articulated any guidance as to how its assumed extraterritorial jurisdiction was to be exercised, and for at least ten of the last 20 years the agency's own regulation was directly contrary to the position the EEOC now claims it has held consistently.

In contrast, the Fifth Circuit's decision in this case is the first thoughtful judicial examination of the issue of the extraterritorial application of Title VII by any court and the only decision by a court of appeals. The law on this question has not been developed in any other circuit, which is reason enough for this Court to deny review.

II. THE FIFTH CIRCUIT'S DECISION PROPERLY APPLIED, AND IS CONSISTENT WITH, THIS COURT'S PRECEDENTS

The Fifth Circuit's carefully reasoned decision that the language and legislative history of Title VII do not reflect the necessary clear expression of congressional intent to apply Title VII extraterritorially is soundly based

on, and consistent with, this Court's decisions concerning the extraterritorial application of legislation. It therefore should not be subject to further review.

The panel and *en banc* majorities correctly started with the established presumption that "the legislation of the Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. . . ." *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949). Pet. App. 3a, 32a.[8] Noting the fundamental concept of sovereignty—"[t]he respect for the right of nations to regulate conduct within their own borders"—that underlies this presumption, the court determined that the suggestion of contrary congressional intent advanced by petitioners was insufficient to overcome the presumption against extraterritorial application of Title VII. *Id.* at 2a.

The EEOC concedes that when faced with the question whether Congress intended extraterritorial application of other statutes that regulate "the relationship between employer and employee" (EEOC Pet. 11), this Court always has found that Congress must express its purpose clearly and affirmatively. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957); *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949). As this Court stated in *Benz*:

> [S]uch a 'sweeping provision' as to foreign applicability was not specified in the Act . . . . For us to run interference in such a delicate field of international relations there must be present *the affirmative intention of the Congress clearly expressed.*

[8] In applying this presumption, the Fifth Circuit followed a long line of authority, including *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932); *United States* v. *Bowman*, 260 U.S. 94, 98 (1922); *Sandberg* v. *McDonald*, 248 U.S. 185, 195 (1918); and *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357 (1909).

353 U.S. at 146-147 (emphasis added). The identical language was used again by this Court in *McCulloch*. 372 U.S. at 21-22. The EEOC attempts to avoid the clear import of these decisions by arguing that while Title VII admittedly regulates "the relationship between employer and employee and thus operates in a field in which other statutes have been held not to apply extraterritorially," it is a statute prohibiting discrimination and not just one regulating employment. EEOC Pet. 11-12. This argument is unconvincing.[9]

Put in its most basic terms, the EEOC argues that the presumption against extraterritorial application of U.S. laws long recognized by this Court is overcome in this case by two provisions in the language of Title VII: (1) the statute's definition of "commerce", which includes the phrase "or between a State and any place outside thereof," 42 U.S.C. § 2000e(g), and (2) a negative inference from the exemption of employers "with respect to the employment of aliens outside any State," 42 U.S.C. § 2000e-1, from which petitioners infer the coverage of U.S. citizens employed outside of any state. EEOC Pet. 8-9. These provisions, plus one sentence from one committee report in the extensive legislative history of Title VII, are asserted to be a sufficient expression of congressional intent

[9] The EEOC concedes that where the application of a statute extraterritorially would violate international law, an even "more stringent variant of the presumption" applies. EEOC Pet. 7 n.4. It suggests, however, that the presumption should not be as stringent here because the application of Title VII extraterritorially "would not violate international law." *Id.* Leaving aside the doubtful accuracy of this unsupported assertion, the prospects for strains in international relations, infringements of sovereignty, conflicts with foreign laws, cultures, values and religions, and the practical problems involved are simply too great to extend Title VII to foreign workplaces in the absence of a specific and clear expression of affirmative intent.

to overcome the presumption against extraterritorial application of U.S. laws. *Id.* at 10-11.[10]

A. The Requisite Clear Expression Of Affirmative Intent Cannot Be Found In Title VII's Definition Of "Commerce"

Title VII defines "employer" as "a person engaged in an industry affecting commerce," 42 U.S.C. § 2000e(b), and defines "an industry affecting commerce" by reference to the meaning of "affecting commerce" in the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402(c). 42 U.S.C. § 2000e(h). That Act in turn defines "industry affecting commerce" as an industry included under the Labor Management Relations Act. This Court expressly has held that the Labor Management Relations Act does not have extraterritorial application. *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. at 142, 147.

The legislative history of Title VII also refers to the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-168. *See* Interpretive Memorandum on Title VII, 110 Cong. Rec. 7212 (1964) ("The term 'affecting commerce' is also familiar, since this is the standard of coverage employed in the National Labor Relations Act . . ."). Yet even though the NLRA contained broad language that clearly referred by its terms to foreign commerce, this Court refused to find a congressional intent to apply the NLRA extraterritorially because there was not "any specific language" in the Act reflecting congressional intent to do so. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 19.

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[10] The impact of this sentence, which referred to a House bill that contained references to "foreign commerce" and "foreign nations" that were later deleted (*see infra* p. 15), is diluted by the indirect nature of the subcommittee's role in developing the legislation that became Title VII. *See* Pet. App. 40a-41a n.4.

Significantly, Title VII as passed by the House of Representatives originally contained specific language that referred to "foreign commerce" and "foreign nations." The Senate deleted this language from the earlier House version, and Congress passed the Senate version.[11] These actions are wholly inconsistent with the notion of a clearly expressed congressional intent to apply Title VII extraterritorially. Indeed, they evidence a decision by Congress not to have the statute extend to employers operating overseas.

Perhaps because of this legislative history and the *Benz* and *McCulloch* decisions of this Court, the dissent did not rely on the definitional sections of Title VII relating to "employer," "commerce" and "industry affecting commerce"—including the phrase "between a State and any place outside thereof" in Title VII's definition of the term "commerce." 42 U.S.C. § 2000e(g). Rather, it characterized them as "traditional Commerce Clause language" that serves merely as "a 'nexus' requirement, providing a basis for Congress's exercise of power under the Commerce Clause." Pet. App. 18a. The EEOC, in contrast to the dissent and unlike its arguments below, now characterizes that language as an affirmative, clear statement of congressional intent to extend Title VII's cover-

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[11] Section 2 of H.R. 405 (later part of Section 701 of Title VII of H.R. 7152) as passed by the House of Representatives included a finding by Congress that the practice of employment discrimination "adversely affects the domestic *and foreign commerce* of the United States" (section 2(a)), and a declaration that the provisions of the Act were necessary, *inter alia*, "[t]o remove obstructions to the free flow of commerce among the States *and with foreign nations* (section 2(c)(1)) (emphasis added). H.R. 405, 88th Cong., 1st Sess. (1963); H.R. 7152; 88th Cong., 1st Sess. (1963).

These provisions were deleted by the Senate. Senator Dirksen inserted an annotated copy of the House bill that reflects the deletion of the foreign commerce language in the Congressional Record on June 5, 1964 in anticipation of debate on the Senate's substitute bill, the Dirksen-Mansfield Amendment. 110 Cong. Rec. 12,811-817 (1964) (remarks of Sen. Dirksen).

age to employers of United States citizens abroad. EEOC Pet. 8.

In furtherance of its recast argument, the EEOC relies on an assertedly similar "broad jurisdictional grant in the Lanham Act" that this Court held to apply extraterritorially in *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 286 (1952). EEOC Pet. 8-9. The Lanham Act, in contrast to Title VII, however, also contained a clear statement of congressional intent to regulate the domestic effects within the United States of the use of deceptive or misleading trademarks overseas, and the Court relied on those direct effects to reach its conclusion. *Steele* v. *Bulova Watch Co.*, 344 U.S. at 283-84.[12] It is unavailing for the EEOC to rely on the Lanham Act as a basis for Title VII's asserted broad jurisdictional reach in view of Title VII's own definitional provisions and legislative history and the decisions of this Court in *Benz* and *McCulloch*.[13]

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[12] The EEOC attempts to rely on *Steele* and other decisions involving the antitrust, trademark, and securities laws of the United States where the laws are intended to reach economic conduct abroad having a direct and substantial effect within the United States. EEOC Pet. 6 n.3. Decisions relying on the direct effects principle, however, are not authority for the extraterritorial application of statutes regulating local and domestic activities such as labor, health and safety practices. *See Restatement (Third) of Foreign Relations Law of the United States* § 414 comment c (1987).

[13] A large number of statutes employ similar or identical "commerce" and "affecting commerce" language to that used in Title VII. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2052(a)(12); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(b); Noise Control Act of 1972, 42 U.S.C. § 4902(7); Radiation Control for Health and Safety Act of 1968, 42 U.S.C. § 263c(4); and Transportation Safety Act of 1974, 49 U.S.C. § 1802(1). The use of such language in these statutes does not evidence any affirmative intent by Congress to extend these statutes extraterritorially, and no court has held that any of these statutes so apply.

B. The Requisite Clear Expression Of Affirmative Intent Cannot Be Found In The Negative Inference From the Alien Exemption Provision

The EEOC secondarily argues that the Act's alien exemption provision would have no meaning unless read to mean that U.S. citizens outside any State are covered. While this negative inference analysis also was the centerpiece of the dissents, the panel and *en banc* majorities pointed out that this provision can and does have meaning simply by reading it consistently with this Court's decision in *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973). Pet. App. 4a, 36a. As this Court held in *Espinoza*, "Title VII was clearly intended to apply with respect to the employment of aliens inside any State." *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. at 95.[14]

Furthermore, as the EEOC notes, aliens are included within the coverage of the Act because they are 'individuals" protected by the prohibitions against unfair employer practices in 42 U.S.C. § 2000e-2. EEOC Pet. 9-10 n.6. The definition of "employer" includes all employers engaged in an industry affecting commerce, and the definition of "commerce" refers to possessions of the United States. 42 U.S.C. §§ 2000e(b), (g). Thus, aliens

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[14] The EEOC attacks this reasoning as being "no plausible explanation" because "Congress could not have intended to employ an *exemption* to extend Title VII's coverage to that group." EEOC Pet. 9-10 n.6 (emphasis in original). Respondents agree that an exemption provision cannot properly *extend* coverage not otherwise clearly provided for in the Act. It is likely, however, that the alien exemption was intended to *confirm* coverage for aliens residing in the United States. The alien exemption provision first appeared in Representative Adam Clayton Powell's 1949 Fair Employment Practices bill at a time when aliens were exempted from certain domestic protective labor legislation and restricted in their employment opportunities within the United States. It was incorporated in the Civil Rights Act of 1964 virtually without comment. *See* Kirschner, *Extraterritorial Application of Title VII of the Civil Rights Act*, 34 Labor L.J. 394, 400 & n.26 (1983).

employed by employers in the possessions of the United States would be covered by Title VII but for the inclusion by Congress of the alien exemption, which provides that Title VII does not extend to the employment of aliens "outside any State." Since "State," as defined by the Act, covers certain territories but does not cover possessions, 42 U.S.C. §§ 2000e(i), aliens employed in the possessions of the United States are exempted from the coverage of Title VII by virtue of the alien exemption provision—a perfectly "plausible explanation" of why Congress included it in Title VII.[15]

Finally, a negative inference from an exemption provision is not a reliable or proper source of the clear and affirmative congressional intent required to rebut the presumption against extraterritorial application of a statute. In *Sandberg* v. *McDonald*, 248 U.S. 185 (1918), the Court held that Congress did not intend the Seaman's Act of 1915 to invalidate advances in wages where the contract and advance payment were made in a foreign country whose law permitted them. The Court reached that conclusion because Congress would not leave "such an important regulation to be gathered from implication." 248 U.S. at 195.

As this Court has stated, Congress knows how to provide expressly for extraterritorial application of a statute when it wants the statute to apply beyond the borders of the United States. *See Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S.Ct. 683, 691 (1989) ("When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute.")

[15] In 1948, this Court held that the term "possession" under the Fair Labor Standards Act included leased bases in foreign nations. *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 390 (1948). The congressional concern with exempting aliens employed within the possessions of the United States as a result of the *Vermilya-Brown* decision in 1948 is at least as likely a reason for inclusion of an alien exemption provision in Title VII as the EEOC's explanation. EEOC Pet. 11 n.7.

Not only does Title VII lack an explicit statement of jurisdiction over employers overseas, it is "curiously silent" on such matters as conflicts with foreign laws, venue for foreign violations, investigatory tools for overseas violations and application to foreign employers of U.S. citizens abroad. Pet. App. 5a. By contrast, statutes that by their explicit language do apply extraterritorially, such as the Age Discrimination in Employment Act of 1967 ("ADEA"), expressly deal with such matters.[16]

Furthermore, as pointed out by the *en banc* court, the extraterritorial application of Title VII necessarily would mean that foreign employers of U.S. citizens abroad would be covered as well as U.S. employers. Pet. App. 5a-6a. In contrast to the ADEA, there are no exemptions stated for foreign employers in the definition of "employer" in Title VII. Thus, if Title VII does apply extraterritorially, by its terms it must cover foreign employers. *Cf. Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980). Indeed, the EEOC's own policy guidance also assumes that Title VII covers foreign employers:

> [T]he Act contains no exemption from coverage for foreign employers even though Congress wrote numerous exemptions in the original statute and its amendments. . . . it is necessary to construe § 702 as expressing a Congressional intent to extend the coverage of Title VII to American and some foreign employers.

[16] *See, e.g.*, 29 U.S.C. § 623(h)(2), which exempts "a foreign person not controlled by an American employer" from the ADEA's prohibitions against age discrimination; and 29 U.S.C. § 623(f)(1), which exempts practices dictated by the laws of the country in which the workplace is located. Congress also specifies whenever it intends that the coverage of a statute extend to U.S. citizens overseas. *See, e.g.*, the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001 (defining "national of the United States"), the Export Administration Act of 1979, 50 U.S.C. app. § 2415(2) (defining "United States person") and the Logan Act, 18 U.S.C. § 953 ("Any citizen of the United States, wherever he may be . . .").

Policy Statement No. 88-15, EEOC Compl. Man. (CCH) ¶ 2187 (1989). Yet Congress would not have applied Title VII to foreign employers without doing so expressly, clearly and affirmatively.

Petitioners' arguments are an attempt to read into Title VII an intent of Congress that simply is not there. They and the dissenting opinions advance a host of policy reasons, better addressed to Congress, seeking to justify a retroactive expansion of Title VII's coverage. In contrast, consistent with this Court's precedents, the Fifth Circuit examined the statute as a whole and found the requisite clear intent lacking. Based on this Court's decisions requiring that an intent to apply a statute extraterritorially must be clearly and affirmatively expressed by Congress, the Fifth Circuit's decision is correct on the merits and should not be subjected to further review.

III. THE EXTRATERRITORIAL APPLICATION OF TITLE VII IS A POLICY MATTER FOR CONGRESS TO DECIDE

The application of Title VII to overseas workplaces would create conflicts with the laws of other countries and in the operations of multinational corporations that employ workforces composed of individuals from many nations. If Title VII were held applicable to employers of United States citizens overseas, multiple employment systems based on the citizenship of particular employees would be required within companies. In addition, foreign employers, to which the Act would apply, might well choose to forgo employing U.S. citizens at all in order to avoid such difficulties.

The total absence of any statutory guidance for resolving the conflicts that would arise necessarily would lead to increased litigation. Determining the applicability of Title VII on a case-by-case basis and attempting to rely "upon the judiciary to minimize conflicts of jurisdiction by exercising a jurisdictional rule of reason" in

individual cases," as the dissent suggests (Pet. App. 25a), would invite a proliferation of litigation on social and policy questions and increase friction with friendly sovereigns.[17]

Unlike the 1964 Congress that enacted Title VII, Congress in the 1984 ADEA amendment explicitly addressed the question of extraterritorial application and provided the "nuts-and-bolts" provisions to make it work.[18] The ADEA amendment was limited to employers controlled by U.S. corporations and even listed the factors to be applied in determining whether such control is present. 29 U.S.C. § 623(h). The amendment also contained an exemption for practices dictated by the laws of the country in which the workplace is located. 29 U.S.C. § 623(f)(1). In contrast, although Title VII if extended extraterritorially would reach even to foreign employers of U.S. citizens abroad, it contains no statutory language that even suggests guidance on such questions.

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[17] Indeed, a similar case-by-case balancing approach, at one time used by the National Labor Relations Board under the NLRA, was rejected by this Court in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. at 19, in favor of "the affirmative intention of the Congress clearly expressed." *Id.* at 22, quoting *Benz*, 353 U.S. at 147.

[18] The EEOC asserts that the 1984 amendment to the ADEA underlines a congressional determination to apply anti-discrimination legislation abroad and then argues that the Fifth Circuit's holding creates "an anomaly" that Congress never intended between the reach of Title VII and the ADEA. EEOC Pet. 12-13. As the EEOC concedes, however, the legislative history of the 1984 ADEA amendment is not "indicative of the intent of the 1964 Congress that enacted Title VII." *Id.* at 13 n.10. Furthermore, this "anomaly" is little more than an argument that Senator Grassley in 1983 incorrectly believed that Title VII applied to employers of U.S. citizens abroad in reliance on two district court opinions, presumably *Love* and *Bryant*, one of which stated that conclusion in *dicta* (*Love*) and the other of which was subsequently reversed on appeal (*Bryant*). *See* 129 Cong. Rec. 34,499 (1983) (remarks of Sen. Grassley).

The absence of such provisions in Title VII is of heightened importance because age is a culturally neutral factor while race, religion, sex and national origin are regarded quite differently in different countries. There are sensitive and sometimes vast cultural differences between this nation and other sovereign states, many of which already regulate such matters, and some of which provide greater protection than does the United States.[19] If Title VII had been intended to extend to workplaces overseas, Congress would have given greater consideration to conflicts with foreign laws and values, particularly in the context of multinational workforces.

Only Congress should decide whether particular U.S. laws should govern workplaces in foreign nations where U.S. citizens are employed. The legislative branch is empowered to make the fundamental policy decisions whether and to what extent to risk infringing upon matters governed by other sovereigns within their own borders who may disagree with the provisions of U.S. employment laws as being inappropriate for application to their own economic, social and labor law systems. Congress "alone has the facilities necessary to make

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[19] At least 48 nations have employment discrimination laws. *See En Banc* Brief of Amicus Rule of Law Committee at 16, *Boureslan* v. *Aramco*, 857 F.2d 1014 (5th Cir. 1990) (*en banc*) (No. 87-2206). Canada's employment discrimination law protects against discrimination on the basis of alcohol or drugs, pregnancy/childbirth, marital status, criminal conviction and other factors. *Id.* at n.18.

In Saudi Arabia, the Labor and Workmen Law of 1969 regulates virtually all employment within the borders of Saudi Arabia, including that of foreign companies. All aggrieved persons working in Saudi Arabia, regardless of citizenship, may vindicate their rights under the law before commissions that are empowered to render final and binding decisions in connection with labor disputes, including those pertaining to termination. *See* Appellee Aramco's Court of Appeals Record Excerpts at tab 9 (No. 87-2206). Similarly, aggrieved persons working in the United States may vindicate their rights pursuant to Title VII whether they are U.S. citizens or foreign nationals.

fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. at 147.

The Fifth Circuit properly declined to make the choices that are assigned to Congress. Pet. App. 41a ("It is not for this court to decide this policy issue for the legislative branch.") As it did after a number of circuits held that the ADEA did not apply extraterritorially, Congress may choose to review Title VII and determine whether to apply Title VII to employers of U.S. citizens overseas, and if so, to provide the explicit language and specific provisions that are necessary. The proper body to make those decisions, however, is the Congress and not the courts.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

As required by Rule 29.1, the parent and subsidiaries of Aramco and ASC are as follows:

Aramco is a Delaware corporation. Aramco has one subsidiary, Trans-Arabian Pipe Line Company. Aramco is owned by Transocean Chevron Company, Exxon Overseas Corporation, Mobil International Petroleum Corporation and Texaco International Trader, Inc. All of Aramco's assets, business and employees recently were transferred to Saudi Aramco.

ASC is a wholly owned subsidiary of the Saudi Arabian Oil Company (Saudi Aramco), which is a Saudi Arabian company that is wholly owned by the Government of Saudi Arabia. All of ASC's subsidiaries are wholly owned.

APPENDIX B

Relevant provisions of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17:

§ 2000e. Definitions

For the purposes of this subchapter— • • •

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

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(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil

service laws of a State government, governmental agency or political subdivision.

• • • •

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

• • • •

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

• • • •

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

• • • •

§ 2000e-1. Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, edu-

cational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

§ 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Relevant provisions of the Age Discrimination Act of 1967, 29 U.S.C. §§ 621-634:

§ 623. Prohibition of age discrimination

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

• • • •

(h) Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

§ 630. Definitions

For the purposes of this chapter— • • •

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

• • • •